COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

D.T.C. 14-2 June 23, 2014

Comcast of Massachusetts III, Inc. v. Peabody Municipal Light Plant and Peabody Municipal Lighting Commission.

HEARING OFFICER ORDER
ON HEARING PROCEDURE AND MOTION TO INTERVENE

I. Introduction:

In this Order, the Department of Telecommunications and Cable ("Department") establishes a two-phase procedural process for its above-captioned investigation, and further grants limited participant status to intervener Ashburnham Municipal Light Plant ("AMLP") as explained below.

II. Background:

On May 14, 2014, the Department held an informal procedural meeting at its Boston offices to discuss the timing and format of its investigation in this docket. In attendance were representatives of Comcast of Massachusetts III, Inc., ("Comcast"), the Peabody Municipal Light Plant ("PMLP") and the Peabody Municipal Lighting Commission ("PMLC"), AMLP, and the Massachusetts Department of Public Utilities ("DPU"). The day prior to the meeting, Comcast proposed a two-phase inquiry into the pole attachment rates of PMLP.

Under the proposal, the first phase of the inquiry ("Phase I") would determine whether the formula ("Massachusetts Formula") set forth in D.P.U./D.T.E. 97-82, *Cablevision of Boston Co. et al. v. Boston Edison Co.*, 1998 WL 35235111 (Apr. 15, 1998) ("Cablevision"), and D.T.E.

98-52, *A-R Cable Servs. Inc., et al. v. Mass. Elec. Co.* (Nov. 6, 1998) ("A-R Cable") for establishing the maximum permitted pole attachment rates of utility companies, applies to municipal light plants and municipal lighting commissions established pursuant to G.L. c. 164. The second phase of inquiry ("Phase II") would focus on discovery and include an evidentiary hearing into the PMLC/PMLP specific facts of the case.

The Department directed the Parties to brief three issues related to Comcast's proposal: (i) whether the proposed two-phase format would unduly prejudice any party to this case or otherwise produce an inefficient or inequitable result; (ii) whether the legal threshold articulated in Phase I is accurate and could be addressed separately from the specifics of the PMLP/PMLC rate studies; and (iii) address the AMLP Motion to Intervene as it would relate to participation in each phase of this investigation.

The Department received briefs in support of a two-phase investigation from Comcast ("Comcast Brief"), and the DPU ("DPU Brief"). *See Comcast of Massachusetts III, Inc. v. Peabody Municipal Light Plant & Peabody Municipal Lighting Comms.*, D.T.C. 14-2 Docket Sheet ("Docket") at 1. The PMLP/PMLC filed a joint brief with AMLP in opposition to a two-phase investigation ("Light Plant Brief"). *Id.*

III. The Hearing Format:

The Department adopts a two-phase procedural schedule because it is the most efficient way to conduct this inquiry given the time constraints presented. The Department's longstanding goal in determining attachment disputes is to encourage streamlined proceedings when possible. *See* A-R Cable at 7. To this end, the Department's procedural rules require a presiding officer to set a hearing schedule that addresses "any other procedural matters that will aid in the orderly disposition of the case." *See* 220 C.M.R. § 1.06 (6)(b)(1). The deadline for the Department to

issue a final determination in this case is 180 days from the first filing, or September 15, 2014. *See* 220 C.M.R. § 45.08. For the reasons discussed below, a two-phase process will best achieve this goal while maintaining the rights of all parties to a full and fair hearing.

The Department is obligated by both statute and regulation to determine whether the PMLP pole attachment rates[1] are just and reasonable. *See* Light Plant Brief at 3; G.L. c. 166 § 25A; 220 C.M.R. §45.00 *et seq.* The Department has reviewed attachment rates before, and has established the Massachusetts Formula as its legal standard. *See* A-R Cable at 7.

In its Cablevision Order[2] "the Department established a method designed to capture the fully-allocated costs of aerial pole attachments which is based on, but not precisely identical to, the federal approach being used by the FCC" and which "is consistent with the Massachusetts pole attachment statute and regulations[.]" Cablevision at 18. The standard was affirmed in A-R Cable because "[t]he Department's intent remains to have a simple, predictable, and expeditious procedure that will allow parties to calculate pole attachment rates without the need for Department intervention." A-R Cable at 7. Thus, the Massachusetts Formula is the standard the Department has endorsed for the evaluation of pole attachment rates, and the Department's procedure in a pole attachment rate case is straightforward: an evidentiary inquiry would be conducted to determine the specific facts, and the Massachusetts Formula would be applied to those facts to arrive at a reasonable rate. *Id.*

PMLP/PMLC and AMLP argue the Massachusetts Formula should not apply in this case because "[t]his proceeding involves parties that are fundamentally different than the investor

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1 The Light Plant Brief additionally asserts the attachment rates of AMLP are at issue in this proceeding. Light Plant Brief at 3. However, as discussed *infra* at 9, AMLP's rates have not been challenged in Comcast's petition, and therefore are not presently at issue.

2 Pursuant to Chapter 19 of the Acts of 2007, the Department of Telecommunications and Energy ("DTE") was dissolved on April 11, 2007. Jurisdiction over telecommunication and cable matters was placed in the newly-established Department of Telecommunications and Cable ("Department"). St. 2007, c. 19. Though newly-established, the Department, as a successor agency to the DTE, and prior to that, the Department of Public Utilities ("DPU"), considers all previous orders of the DTE and DPU to be precedential.

owned utilities in Cablevision and A-R Cable [Servs]." Light Plant Brief at 5. Therefore, "[t]he Cablevision Formula plays a part in the Department's inquiry, but it is not the primary or threshold legal question. *Id.* at 4. According to PMLP/PMLC and AMLP, "[i]n *Cablevision*, the Department stated that it could "depart from the FCC method when additional costs or adjustments to the federal method are justified on state policy grounds [and] … the Department … is free to depart from the federal approach in the future should circumstances warrant to protect the public interest." *Id.* at 4 (citing Cablevision at 19).

If indeed, the PMLP/PMLC and AMLP contention that the Massachusetts Formula is not controlling is correct, then the Department cannot simply apply the case specific facts to determine a rate, but must first determine what standard controls. As explained by the DPU, "[f]irst, it must be determined whether, as a matter of law, the previously established Massachusetts Formula should be applied to PMLP's attachment rates. Second, once the legal standard is established, the facts specific to PMLP must be considered in order to determine the maximum pole attachment rates that PMLP may charge." DPU Brief at 2.

The two questions are very different. Whether the Massachusetts Formula applies is a question of law, universally applicable to all municipal light plants, and independent of the specifics of any particular party. Whether the PMLP rates are just and reasonable, however, is a factual question, requiring an evidentiary inquiry into the PMLP's specific situation. Because the question of controlling standard must be answered before investigating the PMLP rates, and because that question can be answered without a fact finding evidentiary inquiry, a two-phase hearing would be more efficient and result in the most orderly disposition of this case.[3] A two-

[3] Bifurcation of Department proceedings is common where cases present questions of both general applicability and of specific application. *See Comcast of Massachusetts, III, Inc. v. Board of Selectmen of the Town of Framingham,* Interlocutory Order on Standard of Review, Administrative Notice, and Partial Summary Decision, C.T.V. 05-2 at 4 (2006) (determining a standard of review for denial of a franchise

phase hearing is orderly because it permits the Department to determine the appropriate standard of review before evaluating the PMLP specific rates. Moreover, it will narrow the scope of the evidentiary inquiry before discovery is conducted, thereby reducing the likelihood of unnecessary and costly discovery.

PMLP/PMLC and AMLP argued that "[i]n order to assess whether the Cablevision Formula previously enunciated by the Department applies to AMLP and PMLP, the Department must simultaneously consider factual evidence showing cost causation and cost allocation in the context of AMLP's and PMLP's legal structures and purposes." Light Plant Brief at 3. And that the factual evidence in this case is so inextricably intertwined with the relevant legal inquiry that it would be unduly prejudicial to AMLP and PMLP to examine them separately. The Department disagrees.

PMLP/PMLC's and AMLP's argument relies on the assertion that municipal light plants are somehow sufficiently distinct from private pole owners so as to require a departure from Massachusetts Formula when examining the reasonableness of municipal attachment rates. If true, this argument should apply to all municipal light plants independent of "factual evidence showing cost causation and cost allocation in the context of AMLP's and PMLP's legal structures and purposes." And, therefore, PMLP/PMLC and AMLP would not be disadvantaged in asserting this argument in a Phase I hearing limited in scope to the applicability of the Massachusetts Formula to municipal light plants.

If however, the PMLP/PMLC and AMLP argument is that the Massachusetts Formula generally applies but that the "factual evidence showing cost causation and cost allocation in the

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renewal proposal before investigating additional questions of fact); *Investigation on Petition of New England Energy Group,* Order Opening Investigation, D.P.U. 85-178 at 1 (1985) (bifurcating a proceeding into a phase I investigation of whether a rate filing requirement was appropriate generally, and a phase II investigation of specific rates filed).

context of AMLP's and PMLP's legal structures and purposes" justifies a modification in the specific case, then the parties would be able to fully litigate such a claim in a Phase II evidentiary hearing. PMLP/PMLC and AMLP are not harmed by the inability to pursue a defense of their rates under either situation. Indeed, a two-phase procedure preserves the ability of the PMLP/PMLC and AMLP to argue both positions separately. Because a two-phase hearing procedure would result in a more efficient process, and because no party would be unduly prejudiced by such a structure, the Department determines that this case will proceed as a two-phase hearing.

IV. Scope of Phase I:

The Department limits the scope of the Phase I investigation into whether the Massachusetts Formula for establishing the maximum permitted pole attachment rates applies to municipal light plants and municipal light commissions established pursuant to G.L. c. 164. As explained above, the Department's standard rate case procedure is to determine the standard of review and then apply that standard to the specific facts of the rate in question.

PMLP/PMLC and AMLP contend that the "threshold legal issue articulated by the May 15, 2014 Order is misplaced and not the proper inquiry for this proceeding." Light Plant Brief at 10. Instead, PMLP/PMLC and AMLP believe that "[t]he relevant legal inquiry required by Department regulations and G.L. c. 166, § 25A is: whether the AMLP's and PMLP's pole attachment rates are just and reasonable and whether Comcast has nondiscriminatory access to AMLP and PMLP poles." *Id.* While this is undoubtedly the Department's goal, the purpose of the Phase I inquiry is to establish the benchmark by which the Department will evaluate the reasonableness of a municipal light plant attachment rate.

PMLP/PMLC and AMLP contend that "there is already conflicting evidence in this proceeding" and that "[i]n cases such as this, where evidence is conflicting, the administrative agency is 'charged with the responsibility of making findings of fact[.]'" *Id.* at 10 (quoting *Costello v. Dept. of Pub. Utils.*, 391 Mass. 527, 536 (1984)). Accordingly, PMLP/PMLC and AMLP assert that, "only by hearing a full presentation of the legal and factual issues together can the Department make the necessary subsidiary findings to adjudicate this complaint properly." Light Plant Brief at 10. While the Department agrees on the need for findings of fact to properly adjudicate this dispute, as discussed above, such findings can only be determined after the Department determines the standard against which their reasonableness is to be measured. *See supra* at 2. Moreover, the Department finds no compelling reason why such findings of fact could not be established in a Phase II evidentiary proceeding. Because the legal standard must be established before the Department may make any findings of fact, and because no party would be harmed by establishing that standard in a Phase I proceeding, the Department finds that the scope of its Phase I investigation is properly limited to the question of whether the Massachusetts Formula for establishing the maximum permitted pole attachment rates applies to municipal light plants and municipal light commissions established pursuant to G.L. c. 164.

V. AMLP Intervention:

On May 8, 2014, AMLP filed a Petition to Intervene in this docket requesting full party intervener status. Petition of AMLP to Intervene in D.T.C. 14-2, at 1. For reasons discussed below, the Department GRANTS AMLP limited participant status in Phase I of this proceeding.

Entities requesting intervention must demonstrate that they are substantially and specifically affected by the proceedings. G.L. c. 30A, § 10. When evaluating a petition to intervene, a presiding officer may consider "the interests of the petitioner, whether the

petitioner's interests are unique and cannot be raised by any other petitioner, the scope of the proceeding, the potential effect of the petitioner's intervention on the proceeding, and the nature of the petitioner's evidence, including whether such evidence will help elucidate the issues of the proceeding, and may limit intervention and participation accordingly." *Interlocutory Order on Appeal of Hearing Officer Ruling*, D.T.E. 98-118 at 9 (1999). Moreover, "[t]he Department exercises the discretion afforded it under G.L. c. 30A, § 10 so that it may conduct a proceeding with the goal of issuing a reasoned, fair, impartial and timely decision that achieves its statutory mandate." *Hearing Officer Procedural Order*, D.P.U. 96-104 at 11 (1997).

All parties agree that AMLP is a municipal light plant with pole attachments, organized pursuant to G.L. c. 164, and therefore no objections have been raised to AMLP's participation in Phase I of this proceeding. However, both Comcast and the DPU object to AMLP's participation on issues beyond the threshold question of whether the Massachusetts Formula applies to municipal light plants. Comcast Brief at 8; DPU Brief at 2. The DPU asserts AMLP has not shown that it is substantially and specifically affected by Comcast's complaint, and notes that "the pole attachment rate established in this proceeding for PMLP will not apply to AMLP." DPU Brief at 3. Comcast argues that it would be "prejudiced by a grant of full intervenor status to [AMLP] which would essentially require it to litigate on two fronts against both PMLP and [AMLP] on different facts, different contracts and potentially different formulas within the already tight statutory deadline for resolving the Complaint against PMLP." Comcast at 8.

AMLP argues that is has significant interest in this proceeding because "Comcast has unambiguously asserted that it intends to use the outcome of this proceeding as the basis for resolving its pole attachment billing dispute with AMLP." Light Plant Brief at 11. AMLP contends that it "has substantial interest in ensuring the record is fully developed" and to that end

"will bring evidence to this proceeding that will assist the Department in assessing the unique facts and circumstances that municipal light plants present." *Id.* at 12.

Because Phase I of the proceeding is limited in scope to the issue of whether the Massachusetts Formula applies to municipal light plants, the Department finds that AMLP could be affected by the outcome, and welcomes AMLP's limited participation for Phase I. The Department finds, however, that because AMLP's rates[4] are not at issue in this case, and because the Department's determination of PMLP's rates will not impact AMLP's rates, AMLP is not substantially and specifically affected by Comcast's complaint. Moreover, AMLP's introduction of evidence into an investigation of PMLP's rates will only complicate and delay the Department's efforts to determine an appropriate rate within the required deadline. Therefore, the Department limits AMLP's participation in this case to the issue of whether the Massachusetts Formula applies to the attachments of municipal light plants organized pursuant to G.L. c. 164. As a limited participant AMLP shall receive copies of all documents submitted, and shall be permitted to submit a brief in Phase I.

The Department hereby determines that this docket will proceed in a two-phase procedure. Phase I will be limited to the issue of whether the formula set forth in D.P.U./D.T.E. 97-82, *Cablevision of Boston Co. et al. v. Boston Edison Co.,* 1998 WL 35235111 (Apr. 15, 1998), and D.T.E. 98-52, *A-R Cable Servs. Inc., et al. v. Mass. Elec. Co.* (Nov. 6, 1998) for establishing the maximum permitted pole attachment rates of utility companies, applies to municipal light plants and municipal lighting commissions established pursuant to G.L. c. 164. Phase II shall be an evidentiary hearing on the PMLP rates, including discovery into the PMLC/PMLP specific facts of the case. Moreover, the Department GRANTS AMLP limited

[4] The Department notes AMLP is not harmed by being denied an opportunity to submit evidence of its specific pole attachment rates because, in the event their rates are questioned, they would be a full party to an evidentiary inquiry in a separate case, and be provided a full opportunity to defend its AMLP rates.

participant status for Phase I of this case. And, the Department sets July 8, 2014 as the deadline for parties to submit initial briefs for Phase I. Reply briefs for Phase I will be due July 22, 2014. Lastly, parties are directed to submit a joint proposal for a procedural schedule for Phase II of this matter no later than July 8, 2014.

By Order,

/s/ Lindsay E. DeRoche
Lindsay E. DeRoche
Hearing Officer

NOTICE OF RIGHT TO APPEAL

Under the provisions of 220 C.M.R. § 1.06(d)(3), any aggrieved party may appeal this Ruling to the Commissioner by filing a written appeal with supporting documentation within five (5) days of this Ruling. A copy of this Ruling must accompany any appeal. A written response to any appeal must be filed within two (2) days of the appeal.